OMB

TO MR. CARY

FROM: WPB

DATE 19 June 1975

SUBJECT: Comments to OMB on H.R. 141

SUSPENSE DATE 6 June

NOTE:

STAT

You had asked [redacted] to review our comments on H.R. 141, electronic surveillance bill. He approved our draft and attached is the final for your signature. Also attached is a buckslip to the Director.

COORDINATED WITH (list names as well as offices):

Name	Office
J. Warner	OGC
STAT [redacted]	OGC
STAT [redacted]	DDO

ACTION REQUIRED BY GLC: Signature

ROUTING AND RECORD SHEET

SUBJECT: (Optional)

Executive Registry
75-6889

FROM: Legislative Counsel

EXTENSION

NO.

STAT

DATE
20 JUN 1975

TO: (Officer designation, room number, and building)	DATE RECEIVED	DATE FORWARDED	OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
1. Director	6/20	6/23	WCC/61	If you approve, we intend to send the attached to OMB in response to its request for our views on HR 141, a bill prohibiting all warrantless electronic surveillance. This response has been coordinated with OGC and I believe it reflects your views on the subject. In consultation with DDO it has been determined that this letter is unclassified.
2. OLC				
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George L. Cary
Legislative Counsel

Good

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

OLC 75-1082/A

20 JUN 1975

Mr. James M. Frey, Assistant Director
for Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Attention: Mr. William V. Skidmore

Dear Mr. Skidmore:

This is in response to your request for our views on H.R. 141, a bill which seeks to amend Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 et seq. The bill would require that electronic surveillance be undertaken in all cases pursuant to judicial warrant based on probable cause. This would include electronic surveillance conducted against foreign targets to obtain foreign intelligence information. Further, the bill would repeal section 2511(3) which specifically disavows any limitation on the constitutional powers of the President to obtain foreign intelligence information. The Central Intelligence Agency opposes enactment of this legislation.

The Central Intelligence Agency collects foreign positive intelligence information--information on a foreign country, or the activities of a foreign government or its representatives--that is useful in assessing that country's capabilities or intentions. By repealing section 2511(3) and by requiring that the intelligence exploitation of foreign communications be undertaken only when authorized by judicial warrant, H.R. 141 purports to confer on judicial officers the President's constitutional powers to obtain foreign intelligence. However, the necessity for conducting a particular foreign intelligence collection effort is a matter inappropriate for judicial resolution. It is a matter committed to the Executive Branch by the Constitution, for which there are no judicially manageable standards. An arrangement by which federal judges decide what foreign intelligence the President may have in his conduct of foreign relations, or whether he may have any at all in a particular case, is incompatible with the Chief Executive's inherent foreign intelligence-gathering powers and his special competence in foreign affairs.

In addition to this fundamental constitutional objection, there are practical and more specific objections to the provisions of H.R. 141.

The bill attempts to transpose "probable cause" standards, developed to protect the rights of potential criminal defendants, to the area of foreign intelligence collection. It would prohibit the electronic surveillance of foreign sources unless a judicial warrant is obtained issued on probable cause to believe that the source is "engaged in activities which are intended to serve the interests of a foreign principal and undermine the security or national defense of the United States" (emphasis added). Many important foreign communications are not directly related to an undermining of the national security. Therefore, the proposed "probable cause" standard would preclude collection of much important foreign intelligence information. Moreover, in order to establish probable cause, the nature of a specific communication and of the parties thereto would have to be anticipated and demonstrated to the court prior to the communication itself. The fact that several ominous Japanese communications were intercepted both outside and within the United States prior to the attack on Pearl Harbor, but were not processed with sufficient urgency prior to the attack because there was no reason to believe--no "probable cause" to believe--that an attack was imminent, demonstrates the bald unrealism of this requirement, even in cases where activities undermining the national security are underway.

H.R. 141 would require that the necessity for a particular foreign intelligence electronic collection effort be demonstrated to a court. Not only does this raise a fundamental conflict with the separation of powers, but from a practical standpoint, judicial officers are not competent to make judgments in this area. The intelligence involved may not be susceptible to evaluation by persons who do not regularly deal with foreign affairs and intelligence matters. The judgments involved require consideration of matters not available to the judiciary.

As the Department of Justice points out in its comments on this bill, in making a decision to employ electronic surveillance to obtain foreign intelligence, the entire spectrum of pertinent information, much of which is derived from sensitive and confidential sources, is available to the Executive. It would be extremely difficult to convey all relevant information to a court, much less

isolate a particular factor upon which a decision to employ such surveillance would be based. In this connection, it should be noted that the value and significance of information derived from a foreign intelligence electronic surveillance often may not be known until it has been correlated with other items of information--items sometimes seemingly unrelated.

Finally, assuming that Title III of the 1968 Omnibus Crime Control and Safe Streets Act has no extraterritorial application, H.R. 141 may still affect the possibility of conducting electronic foreign intelligence collection outside the United States. H.R. 141 would probably foreclose the possibility of intercepting transnational communications, i.e., foreign communications received in or transmitted from the United States, unless a prior judicial warrant was obtained. Moreover, with respect to the possible interception of foreign communications both transmitted and received overseas, complex questions could be raised where an element of an interception process was within the United States, e.g., the physical presence of the surveillance device.

In view of the foregoing considerations, the Central Intelligence Agency opposes enactment of H.R. 141.

Sincerely,

/s/

George L. Cary
Legislative Counsel

Distribution:
Orig - Adse
1 - DCI
1 - OGC
1 - OLC/Legis
1 - OLC/Subj w/basic
1 - OLC/Chrono
OLC/WPB/ksn (19 Jun 75)

OLC 75-1082

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 16, 1975

LEGISLATIVE REFERRAL MEMORANDUM

To: Legislative Liaison Officer
Department of State
Department of Defense
Central Intelligence Agency

Subject: H.R. 141, a bill cited as the "Surveillance Practices and Procedures Act of 1975" and Justice's proposed report on the same

The Office of Management and Budget would appreciate receiving the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

( ) To permit expeditious handling, it is requested that your reply be made within 30 days.

(XXX) Special circumstances require priority treatment and accordingly your views are requested by

Friday, June 6, 1975

Questions should be referred to Jim Purcell (395-4516) or to William Skidmore (395-4870), the legislative analyst in this office.

William V. Skidmore for
Assistant Director for
Legislative Reference

Enclosures

bc,

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on H.R. 141, a bill which seeks to amend Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510, et seq., with respect to electronic surveillance practices and procedures. It would amend Title 18, United States Code, by adding a specific requirement that electronic surveillance in all national security cases, including those aimed at foreign diplomatic personnel and foreign intelligence operatives, be undertaken only when authorized by a judicial warrant based on probable cause. Further, the bill would strike out Section 2511(3) which currently disclaims any limitation by Congress on the constitutional power of the President to authorize national security electronic surveillance. The Department of Justice opposes enactment of this bill.

At the present time, the President, acting through the Attorney General, may constitutionally authorize the use of electronic surveillance deemed essential to gather information to protect the nation against actual or potential attack or other hostile acts of a foreign power, or to obtain foreign intelligence information deemed essential to the United States. The President derives such authority, as Commander in Chief, under Article II, Section 2, of the Constitution.

Every federal court, without exception, in which the matter has been considered has upheld this Department's contention that such electronic surveillances are lawful when the power of the President in foreign intelligence matters is involved. See, e.g., United States v. Clay, 430 F.2d 165 (5th Cir. 1970), rev'd. on other grounds, 403 U.S. 698 (1971); United States v. Hoffman, 334 F. Supp. 504, (1971); United States v. Brown, 484 F.2d 418 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1973); United States v. Ivanov, 494 F.2d 593 (3rd Cir. 1974), cert. denied, 43 U.S.L.W. 3213 (U.S. October 15, 1974).

The bill, in effect, takes from the President powers which have always been exclusively his, and by requiring that a warrant be issued for electronic surveillance in national security cases, would grant that power to the judiciary. Presently, in making a decision to employ electronic surveillance in national security cases, the entire spectrum of pertinent information, much of which is derived from sensitive, confidential sources and involves matters which must be kept secret, is available to the Executive. In such cases, it would be virtually impossible to convey this information to a court, much less isolate a particular factor upon which a decision to employ such surveillance would be based. (1)

The nature of the sensitive intelligence involved in these cases is such that it is not susceptible to evaluation by persons who do not regularly deal with foreign affairs and intelligence matters. The judgment involved requires consideration of matters not available to the judiciary. Furthermore, the need to acquire foreign intelligence and diplomatic information essential to the United States may involve such emergent matters as the Cuban missile crisis or the outbreak of hostilities in the Middle East. It is obvious that it would be impossible in such situations to comply with the detailed requirements of the bill without seriously hampering our ability to acquire the information as quickly as possible. We, therefore, object strongly to Section 3(a) of the bill which would amend the current statute by deleting entirely Section 2511(3) of Title 18. (2) (3)

We also object to Section 2 of the bill which would amend Section 2510 of Title 18 by adding new subsections pertaining to "foreign agents" and "foreign principals." The intent of this amendment is to require that electronic surveillance may be undertaken against foreign agents and foreign principals only when authorized by a judicially approved warrant. This would be in derogation of the President's constitutional power to authorize the use of such surveillance when deemed essential to gather information for national security purposes, as explained in detail above.

The bill defines a foreign agent as "a person who is engaged in activities which, in the opinion of the Attorney General, are intended to serve the interests of a foreign principal and undermine the security or national defense of

the United States (emphasis supplied). In addition to our general objection, we object specifically to the definition of a foreign agent because it would require that two conditions must be met before the individual could fall within that category, and before electronic surveillance could be judicially authorized against him. First, he must be engaged in activities which, in the opinion of the Attorney General, are intended to serve the interests of a foreign power and second, those activities must be intended to undermine the security or national defense of the United States. This dual requirement would preclude the use of such surveillance against persons such as, for example, foreign commercial or military attaches, who, although they serve the interests of a foreign power, may not necessarily be engaged in activities specifically aimed at undermining the security of the United States. Accordingly, we feel that the definition of "foreign agent" is entirely too restrictive.

Section 4 of the bill would amend Section 2519 of Title 18 by adding new subsections (4) and (5), which require the Attorney General to report quarterly to four specified committees of Congress regarding the number, duration, and cost of interception orders under 18 U.S.C. 2516, et seq. This reporting requirement is not limited to "national security" interceptions, but includes all interceptions applied for and granted under the federal statutes. We oppose such a reporting requirement because information regarding Title III interceptions is currently being supplied on a yearly basis to the Administrative Office of the United States Courts pursuant to 18 U.S.C. 2519(2) and the Director of that Office is required to transmit to Congress the very same information in April of each year pursuant to 18 U.S.C. 2519(3). Thus, Section 4 of H.R. 141 would cause the Attorney General and his staff to engage in formalized, quarterly preparation and reporting of information which is presently being kept and reported to Congress by a body created for just such administrative activities. The duplication of effort would be time and resource consuming and wholly unnecessary.

In view of the foregoing considerations, the Department of Justice opposes the enactment of H.R. 141. The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

A. Mitchell McConnell
Acting Assistant Attorney General